Filed 7/17/12 P. v. Wright CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>PHILLIP L. WRIGHT,<br><br>Defendant and Appellant. | 2d Crim. No. B235056<br>(Super. Ct. No. F438985)<br>(San Luis Obispo County) |

Phillip L. Wright appeals from the judgment after a jury convicted him of battery with serious bodily injury (Pen. Code, § 243, subd. (d))[1] and, in the sanity phase of trial, found that appellant was sane when he committed the offense victim (§ 1026). In a bifurcated proceeding, the trial court found that appellant had suffered two prior strikes (§§ 667, subds. (d) - (e); 1170.12, subds. (b) -(c)), two prior serious felony convictions (§ 667, subd. (a)), and two prior prison terms (§ 667.5, subd. (b)). Appellant was sentenced as a Three Striker to 36 years to life state prison. We affirm.

*Facts*

On October 13, 2009, appellant assaulted a nurse at Atascadero State Hospital while receiving treatment to restore his competency to stand trial. (§§ 1367; 1370.) Before the attack, appellant argued with a patient and shouted, "This mother

[1] All statutory references are to the Penal Code.

fucker needs to learn . . . his place." After the patient sat down, appellant paced back and forth, cursing loudly. Psychiatric Technician Antonio Stephens-Antezana tried to calm appellant and asked if he needed medication (a "P.R.N"). Appellant shouted, "If you offer me another P.R.N., I'm going to fucking kill you."

Appellant clenched his fists and threatened to punch staff. After an emergency alarm sounded, appellant lunged at 58-year old nurse, Sandra Keller, who was seated at a table. He punched her in the face three times breaking her tooth and knocking her unconscious.

Appellant was put in full bed restraints and said he would talk to the police. After the officer read him his *Miranda* rights (*Miranda v. Arizona* (1978) 437 U.S. 385 [57 L.Ed.2d 290]), appellant said "I want an attorney."

Appellant was charged with aggravated assault and entered a plea of not guilty and not guilty by reason of insanity.

In the sanity phase of trial, Doctor Federico Banales testified that appellant suffered from schizophrenia, paranoid type but was sane when he committed the offense. Before the assault, appellant filled out a patient grievance form, researched a legal question in the law library, played ping-pong, had lunch, and argued with a fellow patient. Appellant claimed the patient was dangerous and asked to be moved out of the unit. Appellant was angry, believed that staff was about to forcibly medicate him, and lunged at and hit Nurse Keller. Appellant felt sorry and later apologized.

Doctor Banales opined that appellant understood right from wrong and was "thinking very clearly" when he committed the assault The prosecution asked: "[H]ypothetically . . . [i]f you were presented a set of facts as to events similar to what Mr. Wright was involved with on October 13 and then, shortly after committing that act, the individual who committed that crime was asked to give an interview to police, but they invoked their *Miranda* rights or refused to talk without the assistance of an attorney, would that have an effect upon your opinion as to whether or not that person was legally insane at the time of the commission of the offense?"

"A. [Dr. Banales]: Yes, it would.

"Q. And how so?

"A. Well, what I'm looking for – what an evaluator's looking for is a mental state of the person in as close proximity to the time as the incident occurred as possible, through whatever means that may be. And certainly a police report is a source of information that can be right close to the . . . actual event."

Doctor David Fennell, the senior supervising psychiatrist at ASH, testified that appellant was sane and understood the nature and quality of his actions when he committed the assault. Although appellant had a paranoid ideation, "he still had the mental capacity to understand that it wasn't right for him to batter female staff . . . ." Appellant told Doctor Fennell that the patient " 'was an enemy, and I needed to be moved. Staff thought I was a coward. I was going to show them that I wasn't.' " On cross-exam, appellant's trial attorney asked: "[I]f someone doesn't invoke their *Miranda* rights, are they insane? Doctor Fennell responded, "Oh, I don't believe that's what I said, no. [¶] . . . It shows presence of mind."

Appellant's expert, Doctor Michael J. Selby, a psychologist, opined appellant was insane when he struck the victim. On cross-exam, the prosecution asked: "Did you know that after he was placed in restraints he was asked by a police officer if he wanted to give his version of what happened? Correct?"

"A. I don't recall that, no, sir.

"Q. Well, if I were to tell you that Mr. Wright, when he was questioned by the authorities, said that he wanted to speak to an attorney –

"A. Oh, I remember that, yes.

"Q. Does that have any bearing upon your opinion as to whether or not he was actively insane at the time he committed the crime?

"A. No."

*Doyle Error*

Appellant argues that the prosecution committed *Doyle* error (*Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91]) in arguing and presenting evidence that appellant invoked his *Miranda* rights. In *Doyle*, the court concluded that it is a due

process violation to use a defendant's postarrest silence to impeach defendant's exculpatory story told for the first time at trial. (*Id*., at p. 611 [49 L.Ed.2d at p. 94].)

In *Wainwright v. Greenfield* (1986) 474 U.S. 284 [88 L.Ed.2d 623] the United States Supreme Court extended *Doyle* to a criminal case in which the prosecution used the defendant's post-*Miranda* silence to overcome a plea of insanity. (*Id*., at p. 292 [88 L.Ed.2d at pp. 630-631].) "The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity." (*Ibid.* [88 L.Ed.2d at pp. 630-631].)

Here the prosecutor argued that appellant's post-arrest *Miranda* silence was a factor relied on by Doctor Fennell in evaluating appellant's sanity.[2] Appellant did not object to the prosecutor's remarks or questions and is precluded from claiming *Doyle/Wainwright* error on appeal. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 63; *People v. Huggins* (2006) 38 Cal.4th 175, 198 [*Doyle* error forfeited by failure to object]; People *v. Hughes* (2002) 27 Cal.4th 287, 332 [same].)

On the merits, the alleged error was harmless whether assessed under the federal or state Constitutions. (*Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705; see *People v. Earp* (1999) 20 Cal.4th 826, 856-858.) The sanity evidence was overwhelming and showed that appellant understood the nature and quality of his act and knew that it was morally wrong to attack the victim. (§ 25, subd. (b): *People v. Hernandez* (2000) 22 Cal.4th 512, 520-521.) Appellant "attempts to characterize sanity

---

[2] Appellant argues that the prosecutor told the jury that appellant's invocation of his *Miranda* rights " 'in and of itself' showed appellant knew right from wrong, and was thus guilty." This misstates the record. The prosecution, in the sanity phase of trial, told the jury: "Dr. Fennell will point out to you that shortly after committing this offense . . . when the police at Atascadero State Hospital tried to interview him, he invoked his *Miranda* rights. In Dr. Fennell's opinion, that is something that would not be consistent with somebody who was legally insane at the time they committed this offense. "

as an element of the offense charged, when in fact the question is one of insanity as a defense." (*People v. Ferris* (2005) 130 Cal.App.4th 773, 780.)

Appellant had a clear recollection of his actions. He told Doctor Banales that he filled out a patient grievance form, researched a legal question in the law library, played ping-pong, had lunch, and argued with a patient who accused him of being the devil. Appellant believed the patient was dangerous, asked to be moved out of the unit, and was angry that staff acted unconcerned.

Appellant threatened to punch staff and said "I could take all four of you." Appellant lunged at and beat Nurse Keller, and later apologized. Doctor Banales opined that appellant was sane and understood the difference between right and wrong when he committed the assault. Doctor Fennell concurred and testified that appellant "clearly understood what he was doing. . . ."

All the experts agreed that appellant was mentally ill but differed on whether it rendered him legally insane when he struck Nurse Keller. Appellant's expert, Doctor Selby, testified that appellant's invocation of his *Miranda* rights had no bearing on whether appellant was insane.

Having reviewed the entire record we conclude that the *Doyle/Wainwright* error was harmless under any standard of review. (*People v. Hughes, supra*,27 Cal.4th 287, 332.) Although *Doyle/Wainwright* protects important due process rights, it "is amenable to harmless-error analysis because it 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].' [Citation.]" (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 629 [123 L.Ed.2d 353, 367] [*Doyle* violation is "trial error" subject to harmless error inquiry].)

The lack of prejudice is fatal to appellant's related claim that he was denied effective assistance of counsel.[3] (*People v. Coffman, supra,* 34 Cal.4th at p. 120.)

---

[3]Appellant, in a companion habeas petition (B240316), alleges that he was denied effective assistance of trial counsel but there was no prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 688 [80 L.Ed.2d 674, 693]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217, 218. "A defendant must prove prejudice that is a ' "demonstrable reality," not

(*Jeffries v. Blodgett* (9th Cir. 1993) 5 F.3d 1180, 1190.) "Evidence introduced by the prosecution will often raise more than one inference, some permissible, some not; we must rely on the jury to sort them out in light of the court's instructions. Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.' [Citation.]" (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.)

The jury was instructed that counsel's questions and statements were not evidence (CALCRIM 222), that appellant was presumed sane, and the burden was on appellant to show that he was insane when he committed the assault. (CALCRIM 3450.) It is presumed that the jury understood and followed the instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

Unlike *Wainwright*, the burden was on appellant to prove legal insanity. After the jury returned a guilty verdict for aggravated assault, appellant introduced evidence that his mental illness was so debilitating that he did not know right from wrong when he assaulted Nurse Keller. Doctor Selby, a defense expert, testified that appellant did not know what he was doing and was "very delusional" after he was put in full bed restraints. In a November 22, 2009 psychological evaluation, Doctor Selby reported: "Mr. Wright's statements following his placements in full bed restraints is consistent with the presence of paranoid delusional thought processes . . . . Those paranoid delusional thought processes remain unchanged despite use of psychotropic medications at the time of my interview with Mr. Wright."

The prosecution could lawfully impeach and rebut Doctor Selby by presenting evidence establishing a different explanation for appellant's lack of communication. (See e.g., *People v. Jones* (1997) 15 Cal.4th 119, 172.) "Unlike the prosecution's action in *Doyle*, the prosecution here did not use defendant's silence at the time of his arrest to show that his testimony at trial was recently fabricated. Unlike

---

simply speculation.' [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) We summarily deny the habeas petition by separate order.

[*Wainwright v.*] *Greenfield*, the present case did not involve an attempt by the prosecution to use defendant's invocation of his right to remain silent to show that defendant possessed the mental acuity to understand his constitutional rights. Rather, the prosecution introduced the evidence in question to show that defendant's silence [or delusional statements] was not probative of the extent of defendant's mental illness, as the defense claimed . . . ." (*Id*., at p. 174.)

Appellant makes no showing that references concerning the invocation of his *Miranda* rights rendered the trial fundamentally unfair. Nor has appellant demonstrated that the prosecution's questions and remarks were so egregious that it infected the integrity of the trial or resulted in a miscarriage of justice. (*Brecht v. Abrahamson, supra,* 507 U.S. at p. 638, fn. 9 [123 L.Ed.2d at p. 373, fn. 9].)

*Romero Motion*

Appellant argues that the trial court abused its discretion in denying his motion to strike two prior convictions for robbery. (*People v. Superior Court* (*Romero* ) (1996) 13 Cal.4th 497, 530-531.) Appellant's criminal record, which dated back 20 years, included a 1995 conviction for second degree robbery and another robbery conviction in 2002. Appellant requested that the trial court strike the 1995 conviction and sentence him as a two striker because appellant has been plagued with drug dependency and mental health issues most of his life.

The prosecution argued that appellant's mental health was not a mitigating circumstance. Appellant had spent most of his life incarcerated and continued to commit violent crimes while incarcerated.

The trial court found that appellant "is truly a career criminal." Appellant's criminal record "starts in 1988 at the age of 15 in juvenile court with drug offenses; in 1991, at the age of 18, another drug offense; started in the adult system in 1993 at the age of 20 with a felony drug offense; at the age of 22, convicted of robbery in Oakland. . . . A year later, at the age of 23, he's found on a bus in Oakland with a loaded .357 firearm. . . . [¶] In 2001, at the age of 28, he had another misdemeanor theft offense; a year later, at

the age of 29, he committed the second robbery where . . . he broke the nose of the named victim. . . . That resulted in a seven-year prison commitment. [¶] At the age of 36, he was sent to Atascadero State Hospital under PC – 1367 for allegations involving second-degree burglary, two counts, and being in receipt of stolen property."

The trial court found no mitigating factors and "several factors in aggravation that are statutory . . . . The crime involved great violence, great bodily harm, the threat of bodily harm; Mr. Wright had engaged in violent conduct in the past which indicates a serious danger to society; his prior convictions as an adult or sustained petitions in juvenile court are numerous and increasing seriousness; Mr. Wright ha[s] served a prior prison term; and his prior performance on probation or parole has been unsatisfactory."

Once a career criminal commits the requisite number of strikes, the "circumstances must be 'extraordinary"' before he or she can be deemed to fall outside the spirit of the Three Strikes law." (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) Appellant makes no showing that the trial court abused its discretion in denying the *Romero* motion or that the sentence is "so irrational or arbitrary that no reasonable person could agree with it." (*Id*., at p. 377.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

John A. Trice, Judge

Superior Court County of San Luis Obispo

---

Jean Matulis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Erika D. Jackson, Deputy Attorney General, for Plaintiff and Respondent.